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Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1994

FLORENCE J. GILBERT, ROGER L. BLAIR, ALVIN L. NEAL, EUNICE M. ROBINSON, and LORETTA L. LONDON, on behalf of themselves and all others similarly situated,

Petitioners,

v.

DONNA E. SHALALA, Secretary of the Department of Health and Human Services,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does *Lujan v. Defenders of Wildlife*, 112 S.Ct. 2130 (1992) preclude standing to petitioners, applicants for Social Security disability benefits to assert their constitutional rights due to their alleged inability to rely upon specific language of denial notices which violated their Fifth Amendment right to procedural due process?

2. Are some or all of the denial notices void as violative of procedural due process?

3. When the government admits the prior agency action was unreasonable by mooting the claim for reasons other than those stated in the complaint, has the government shown its position was substantially justified under the EAJA?

LIST OF PARTIES

The parties to the proceedings are:

Petitioners:

FLORENCE J. GILBERT, ROGER L. BLAIR, ALVIN L. NEAL, EUNICE M. ROBINSON, and LORETTA L. LONDON.

Respondent:

DONNA E. SHALALA, Secretary of the Department of Health and Human Services.

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OPINIONS BELOW

The decision and final judgment of the United States District Court for the District of Colorado denying Petitioners' request for declaratory relief is reported in *Gilbert v. Shalala*, 828 F.Supp. 815 (D.Colo. 1993) (App. 16). The District Court's judgment denying Equal Access to Justice Act (EAJA) relief (App. 10) is also appended. The decision of the Tenth Circuit Court of Appeals, sustaining the trial court's holding that Petitioners lacked standing and that the government's position was reasonable in law and fact is reported. *Gilbert v. Shalala*, 45 F.3d 1391 (10th Cir. 1995) (App. 1).

STATEMENT OF JURISDICTION

This Court has jurisdiction to review a final decision of the United States Court of Appeals for the Tenth Circuit pursuant to 28 U.S.C. § 1254(1).

Jurisdiction in the District Court was invoked under 42 U.S.C. § 205(g), which court issued a final judgment on the merits on July 26, 1993. On November 11, 1993, Petitioner Neal filed a timely motion for EAJA relief, denied by the trial court's order dated December 16, 1993.

Petitioners filed a timely notice of appeal to the Tenth Circuit Court of Appeals both on October 6, 1993 and on March 16, 1994 (extension granted). Title 28 U.S.C. § 1291 provided federal appellate jurisdiction over the final judgments of the District Court.

This Petition for Writ of Certiorari is timely filed within 90 days of the consolidated Tenth Circuit Order of January 17, 1995, by April 17, 1995.

STATUTES INVOLVED

28 U.S.C. § 2412(d), provides in pertinent part:

> . . . a court shall award to a prevailing party . . . fees and other expenses . . . incurred by that party in any civil action . . . against the United States . . . unless the court finds that the position of the United States was substantially justified . . . 28 U.S.C. § 2412(d)(1)(A).

28 U.S.C. § 2412(d)(2)(D), provides in pertinent part:

> " 'position of the United States' means, in addition to the position taken by the United States in the civil action, the action or failure to act by the agency upon which the civil action is based; except that fees and expenses may not be awarded to a party for any portion of the litigation in which the party has unreasonably protracted the proceedings".

STATEMENT OF THE CASE

A. Procedural History

As claimants for disability insurance benefits under Titles II and XVI of the Social Security Act, 42 U.S.C. §§ 401, et seq., 1381, et seq., Petitioners applied for benefits and received denial notices from the Social Security Administration (SSA) which violated their Fifth Amendment rights to procedural due process. Instead of appealing, they refiled.

While their present claims for benefits and to reopen their prior claims were pending, Petitioners filed suit against the Secretary for themselves and a class of persons in the Tenth Circuit similarly situated requesting injunctive and declaratory relief to have said notices declared unconstitutional and to reopen their past claims.

The District Court denied relief on the grounds that the Petitioners lacked standing to assert their constitutional rights, as they had not, pursuant to *Lujan v. Defenders of Wildlife*, 504 U.S. ___, 119 L.Ed.2d 351, 364, 112 S.Ct. 2130 (1992), shown a "causal connection between their alleged injury and the SSA's denial notices" (App. 27). Because Neal's claim was reopened during the litigation, the trial court held "he has suffered no injury in fact. Furthermore, his claim is moot" (App. 25). Since the Secretary had reopened his claim "on grounds other than those challenged here", and the trial court found Defendant's position was substantially justified, the court further held that Neal was not entitled to EAJA relief (App. 13).

The Tenth Circuit affirmed. The court emphasized Petitioners' "lack of reliance" upon the notices failed to show "a causal connection between their injury and the allegedly deficient notices" (App. 4).

The Court of Appeals also found "that the government was reasonable in its position that the denial notices were constitutionally adequate" and upheld the denial of EAJA fees (App. 6).

B. Statement of the Facts

1. Administrative Procedure

In their applications[1] for social security disability insurance benefits, Petitioners received certain denial notices containing the following language:

1. Title II notices:

> If you do not request reconsideration [or "if you do not request a hearing"] of your case within the prescribed time period, you still have the right to file another application at any time.

2. Title II notices:

> If you do not request reconsideration [or "if you do not request a hearing"] within the sixty-day time limit, you still have the right to file another application at any time. A new application is not the same as an appeal of this determination.

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[1] These were the past applications, not the present applications pending or on appeal. Petitioner Gilbert applied in 1985, was denied and requested a reconsideration but did not appeal the reconsideration. Petitioner Blair applied in 1987 and in 1989, was denied initially and did not appeal either claim. Petitioner Neal applied in 1983, 1987 and 1989. His first two claims were denied initially, not appealed. He was granted Title XVI benefits only in 1989. Petitioner Robinson applied in 1987 and 1991. Her 1988 request for hearing was withdrawn. Her 1991 claim was denied initially with no appeal. Petitioner London applied in 1983, 1984 and 1989. She was denied initially and did not appeal, except the 1989 claim when she requested reconsideration, was denied but did not appeal. Only Robinson was represented and only in her 1987 claim.

3. Title XVI notices:

> If your condition gets worse [or "does not improve"] you may file a new application for Supplemental Security Income payments.
>
> If at any time in the future you think you qualify for payment, please contact us immediately about filing a new application. We cannot make payment for any month before the month in which you apply.

4. Title XVI notices:

> If at any time in the future you think you qualify for payment, please contact us right away about filing a new application. This is important to you because we cannot pay you for any day before the day in which you file an application or the day you meet all the requirements, whichever is later.

Instead of appealing all their denials, Petitioners later reapplied for benefits. In their most recent applications, they requested their prior claims be reopened,[2] however, with the exception of Petitioner Neal, those requests to reopen addressed by the SSA were denied on the grounds the prior denials were binding because of administrative res judicata.[3] Petitioners have lost benefits thereby.

---

[2] Social Security regulations preclude reopening prior claims except under narrow exceptions unless "good cause" is shown and only if the second claim was filed within four years of the initial prior denial (two years for SSI). 20 C.F.R. §§ 404.988, 404.989, 416.1488, 416.1489.

[3] Petitioners Gilbert and London's requests to reopen were denied because of Acquiescence Ruling (AR), 92-7(9) (the Gonzales AR). Their cases are pending in District Court. Petitioners Blair and Neal's claims are before the Appeals Council and Petitioner Robinson's claim is awaiting a hearing.

2. The Parties

Petitioner Florence J. Gilbert, 60, has the following impairments: tachycardia, cardiomegaly, asthma, obesity, degenerative disc disease of the lumbar spine and status post repair of atrial septal defect in 1989. She was denied reopening of her 1985 widow's claim because of the Gonzalez AR. Her testimony deposition revealed the following exchange:

> Q: But does this say that you can reapply and get all the benefits back to the very beginning?
>
> A: I understood it that way.
>
> Q: What was it about this sentence that made you think it said that?
>
> A: By applying from one – from when I did, that I would still be eligible for the benefits at that time.
>
> Q: Okay. But it doesn't say anything about reopening a claim, or going back in time, and I want to know how you understood that. How did you gain your understanding from this sentence?
>
> A: I just still believed that I would be able to get the benefits from that time.

Petitioner Roger L. Blair, 44, according to reports of the Social Security consultative psychiatrist and a treating physician, suffers from organic mental disorder with retrograde amnesia, passive/aggressive personality disorder, seizure disorder, degenerative disc disease, liver dysfunction, fibrositis syndrome with sleep disorder and arm, neck and leg pain. He was undone in a 1985 on-the-

job altercation with a 290 lb. supervisor who threw him against a wall and on the floor which resulted in a loss of consciousness and fractured ribs and sternum. Mr. Blair's testimony was as follows:

Q: After 1989, did you apply, again, for Social Security benefits?

A: I couldn't tell you. I don't remember.

Q: Do you have a current application pending?

A: I couldn't tell you that.

Q: Have you been to the Social Security office since 1989?

A: I couldn't tell you that either.

Q: But you are still disabled, correct?

A: Yes.

Q: Are you expecting to hear from Social Security about benefit checks?

A: Sooner or later.

Q: Well, is that because you've applied recently?

A: I can't tell you when I applied last.

Q: Well, have you ever asked Social Security to reopen any of your old claims, these three claims we've talked about?

A: I couldn't tell you that either.

Q: Are you getting Social Security checks now?

A: No, sir.

Q: Are you –

A: See, tomorrow – like tomorrow, I won't be able to tell anybody what you and I – us – sat here and discussed.

Q: All right. All right.

A: And that's from the medication, or my head injury. I don't know which one.

Q: Let me ask you this: Why are you suing the government?

A: 'Cause I worked all my life, and now I can't – now I can't work.

Q: So you believe you have a right to disability?

A: Yes, sir. I always thought that's what it was there for.

Petitioners Alvin L. Neal, 35, and Eunice M. Robinson, 49, are schizophrenic. In 1992, the Secretary admitted Neal's 1987 claims file contained evidence pertinent to the earlier claim attesting to an underlying lack of capacity to understand the requirements, procedures or necessity for requesting appeal, and decided to reopen all of his earlier Title II claims.

Petitioner Robinson was adjudicated per-se disabled on March 8, 1984 by J. M. Wilcox, Administrative Law Judge, whose decision contains the following:

> The claimant has a long history of mental illness which has required six admissions to the Colorado State Hospital. (Exhibit omitted). Her record shows cyclical patterns of marginal functioning interrupted by periods of active psychosis in which she becomes "extremely bizarre and delusional". For example, it is reported that the claimant believes that others are trying to

harm her, often by providing her with poisoned food and that computers and other electronic devices have been implanted in her brain. The report from Roy Rosenthal, M.D. indicates that during these psychotic episodes the claimant responds by becoming hostile, aggressive and verbally and physically assaultive. (Exhibit omitted)

* * *

. . . it was (mental health counselor) Brenda Cameron's opinion that the claimant's ability to understand, carry out and remember instructions . . . were all moderately severely restricted.

* * *

The administrative law judge concludes that the claimant's impairments meet . . . section 12.03 of the listings insofar as she has been diagnosed as suffering from paranoid schizophrenia and has also had depression, hallucinations, and delusions. This has resulted in a persistence of marked restriction of daily activities, constriction of interests and a seriously impaired ability to relate to other people. Because the claimant's impairments meet the listings, she must be found disabled.

Petitioner Loretta London, 40, was injured as a passenger in a 1983 automobile accident, which left her, according to the report of the Social Security consultative psychiatrist, with an organic mental disorder secondary to traumatic head injury with significant retrograde amnesia, a chronic pain syndrome, a secondary opiate addiction, a mild panic disorder and status post-traumatic fracture of the right leg. She was denied reopening of her 1983, 1984 and 1989 claims because of the Gonzalez AR.

REASONS FOR GRANTING THE WRIT

A. There is a Conflict Among the Circuits

1. The circuits are split with regard to whether and in what circumstances Social Security disability plaintiffs have standing to assert their constitutional rights.

In limiting standing only to plaintiffs who "show that they relied on the challenged language in the denial notices" (App. 5), the ruling below denies standing to disabled Petitioners who cannot articulate or remember the precise reasons for their acts, which occurred up to ten years prior.

The Eighth Circuit, in accord, stated as follows:

> She does not say that after reading the notice she understood it to mean that she could apply again at any time for benefits for the periods involved in her denied claims and that, *for that reason*, she decided to forego further review *at that time*. (emphasis added)

Burks-Marshall v. Shalala, 7 F.3d 1346, 1350 (8th Cir. 1993).

In contrast, the Sixth Circuit does not require reliance on the specific language of a defective notice. Instead, the Sixth Circuit assumes detrimental reliance on the notice upon the filing of a new claim, as follows:

> Although the Title II reconsideration denial notices used before February 1990 failed to satisfy the requirements of due process, the only claimants who could have been injured by the inadequacy are those who detrimentally relied on the inadequate denial notice. A claimant relied to his or her detriment on the inadequate

> notice if he or she was denied benefits at the reconsideration level, then received the inadequate notice and thereafter *filed a new application rather than continuing the appeal process,* and then were presented by the Secretary with a claim of res judicata or received less in retroactive benefits than he or she would have had they successfully appealed initially. (emphasis added)

Day v. Shalala, 23 F.3d 1052, 1066 (6th Cir. 1994). Standing is accorded a Sixth Circuit claimant upon the filing of a new application,[4] not upon an articulation of the reason for it.

The Ninth Circuit, not imposing as a condition precedent to standing either a statement of specific reliance on the exact wording of the notice as required by the Tenth and Eighth Circuits or the reliance assumed by the filing of a new claim as required by the Sixth Circuit, instead impliedly assumes detrimental reliance occurred because the notice was misleading and the claimant did not appeal. *Gonzalez v. Sullivan,* 914 F.2d 1197, 1203 (9th Cir. 1990), cited in *Cuffee v. Sullivan,* infra, which went on to state the following:

> Defendants attempt to convince this Court that plaintiff Wolbert does not have standing to raise the issue of the denial notices because "it is abundantly clear that plaintiffs Wolbert was not misled by the notices she received". Further, defendants argue, "the undisputed facts show

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[4] The prerequisite for inclusion of a class of Iowa, Kansas, Missouri or Nebraska residents at the time an application was filed after November 16, 1986 is also the filing of another application, *Peck v. Sullivan,* No. 88-173-0-1 (D.Iowa, Nov. 15, 1990). See the "Program Operations Manual System" (P.O.M.S.) 03109.100, et seq.

> that plaintiff Wolbert was not injured by the notice she received . . . " This Court disagrees. Ms. Wolbert was denied, received the defective disability denial notice and did not appeal the denial. It is not clear to this Court that Ms. Wolbert was not misled by the notice, and the Court does not know how Ms. Wolbert would have proceeded had she received a properly worded denial notice. The fact is, she was not given a proper denial notice, thus she was not able to make an informed decision.

Cuffee v. Sullivan, 842 F.Supp. 1219, 1225 (W.D.Mo. 1993). Another court has arrived at the same conclusion by the doctrine of reasonable expectations, *Christopher v. Sec'y of Health and Human Services*, 702 F.Supp. 41, 43 (E.D.N.Y. 1988) (From reading the notice, she could have reasonably expected that declining to continue the appeal process would not have an impact on benefit determinations made in the future . . . even a notice which is merely ambiguous may violate an applicant's due process rights).

Clearly, in the matter of standing there is a conflict between the circuits. Freely granted in the Sixth and Ninth Circuits, standing of Social Security disability insurance applicants to assert their constitutional rights to due process is denied in the Eighth and Tenth Circuits.

2. The circuits are split with regard to whether the notices violate due process.

In ruling that the said notices were constitutionally adequate, the Tenth Circuit stands alone among the Circuits. (App. 6).

The Ninth Circuit ruled the notice containing the phrase "you still have the right to file another application at any time" (notice #1 above) violated procedural due process, as follows:

> The form of the notice used here is sufficiently misleading that it introduces a high degree of error into the disability decision making process . . . The notice given in this case does not clearly indicate that if no request for reconsideration is made, the determination is final.

Gonzalez v. Sullivan, 914 F.2d 1203. Pursuant to *Gonzalez*, the Social Security Administration (SSA) adopted procedures in the Ninth Circuit which treat notices similar to the Gonzalez notice to be unconstitutional.[5]

On the other hand, the Sixth Circuit holds that the notice in *Gonzalez* itself is unconstitutional but not when it also includes the language in *Cuffee*, which adds: "a new application is not the same as an appeal of this determination". *Day v. Shalala*, 23 F.3d 1065.

The Eighth Circuit made a strong indication it would find the language in *Gonzalez* (notice #1 above) violative of due process to "at least those without legal counsel". *Burks-Marshall v. Shalala*, 7 F.3d 1349, when it stated the following:

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[5] P.O.M.S. 03109.001, et seq. This is the notice #2 above and determined unconstitutional by the court in *Cuffee v. Sullivan*, 842 F.Supp. 1219 (W.D.Mo. 1993), accord *Robinson v. Shalala*, 1994 WL 119355 (S.D.N.Y. April 4, 1994) cited in *Delyria v. Shalala*, 856 F.Supp. 1432 (D.Or. 1994).

> Both the Ninth Circuit and several district courts have considered this issue; most of these courts have concluded that this precise language violates the procedural-due-process rights of claimants, at least those without legal counsel, or at a minimum creates a colorable constitutional claim – thus allowing a claimant to reopen or defeat a res judicata argument. *Gonzalez v. Sullivan*, 914 F.2d 1197 (9th Cir. 1990); *Aponte v. Sullivan*, 823 F.Supp. 277 (E.D.Pa. 1993); *Christopher v. Secretary of Health and Human Services*, 702 F.Supp. 41 (N.D.N.Y. 1989); *Butland v. Bowen*, 673 F.Supp. 638 (D.Mass. 1987); *Aversa v. Secretary of Health and Human Services*, 672 F.Supp. 775 (D.N.J. 1987); *Dealy v. Heckler*, 616 F.Supp. 880 (W.D.Mo. 1984). But see *Gilbert v. Shalala*, 828 F.Supp. 815 (D.Colo. 1993). (footnote omitted).

The split among the circuits as to the constitutionality of the notices in question must be resolved.

B. The Case at bar Conflicts with Prior Rulings of this Court

1. The Tenth Circuit's holding denying petitioners' standing is contrary to the rulings of this Court.

The rulings below relied upon *Lujan*, supra, a global environmental damage case, which is inapposite. Petitioners lost Social Security disability insurance benefits as a direct result of the Secretary's defective notices which denied prior claims the Secretary later refused to reopen. As a result, Petitioners had "a personal stake in the outcome of the controversy" sufficient for standing. Ibid. at 498, 499, citing *Baker v. Carr*, 369 U.S. 186, 204, 82 S.Ct.

691, 7 L.Ed.2d 663, 678 (1962); *Sierra Club v. Morton*, 405 U.S. 727, 734, 735, 92 S.Ct. 1361, 31 L.Ed.2d 636, 643 (1972). Consequently, Petitioners "made out a 'case or controversy' between themselves and the defendant within the meaning of Article III", *Worth v. Seldin*, 422 U.S. 490, 95 S.Ct. 2197, 45 L.Ed.2d 343, 354 (1975). The constitutional limitation of standing should not without redress allow the Secretary to violate claimants' constitutional rights, *Califano v. Sanders*, 430 U.S. 99, 109, 97 S.Ct. 980, 51 L.Ed.2d 192, 201 (1977) (when constitutional questions are in issue, the availability of judicial review is presumed). The loss of due process for even minimal periods of time constitutes irreparable injury, *Elrod v. Burns*, 427 U.S. 347, 373, 96 S.Ct. 2673, 2689, 49 L.Ed.2d 547 (1976). Even adequate notice to an incompetent person without a guardian violates due process.[6] *Covey v. Somers*, 351 U.S. 141, 146, 147, 76 S.Ct. 724, 100 L.Ed. 1021, 1026 (1955).

2. The Tenth Circuit's holding below with regard to the constitutionality of the notices violates this court's prior rulings.

This Court has previously defined due process in terms of the notion of fair play and substantial justice, *Milliken v. Meyer*, 311 U.S. 457, 463, 61 S.Ct. 339, 85 L.Ed.278 (1940), which requires notice be given in a meaningful manner; *Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S.Ct. 1187, 14 L.Ed.2d 62, 66, 67 (1965), which

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[6] SSA determined that Neal and Robinson required payees; the SSA examining psychiatrist recommended Blair have a payee.

notice must be tailored to the capacities and circumstances of those who are to be heard; *Goldberg v. Kelly*, 397 U.S. 254, 267-8, 90 S.Ct. 1011, 1020, 25 L.Ed.2d 287, 299 (1970), and which notice under all the circumstances affords one of the opportunity to object or appeal; *Memphis Light, Gas and Water Div. v. Craft*, 436 U.S. 1, 13, 14, 98 S.Ct. 1554, 1562-63, 56 L.Ed.2d 30 (1978) quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S.Ct. 652, 657, 94 L.Ed. 865, 873 (1950).

A notice violative of due process is void or voidable, *Roller v. Holly*, 176 U.S. 399, 408, 20 S.Ct. 410, 44 L.Ed. 520, 524 (1900); *Armstrong v. Manzo*, 380 U.S. 552, and is presumed not waived; *Fuentes v. Shevin*, 407 U.S. 67, 94 n. 31, 92 S.Ct. 1983, 32 L.Ed.2d 556, 578 n. 31 (1972).

Given Petitioners' disabilities, the notices in question violated due process because they did not adequately impart the required finality of appealing instead of reapplying and if the latter were chosen, the risk of losing benefits thereby. By omitting the finality and loss of rights language,[7] the Secretary did not save any money or trouble but caused a high risk of erroneous deprivation of disabled claimants' rights, *Matthews v. Eldridge*, 424 U.S. 319, 335, 96 S.Ct. 893, 903, 47 L.Ed.2d 18 (1976). The Tenth Circuit's holding that the Secretary was reasonable in its

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[7] In 1990, SSA revised its denial notices to include the following:

> You have the right to file a new application at any time, but filing a new application is not the same as appealing this decision. You might lose benefits if you file a new application instead of filing an appeal. Therefore, if you think this decision is wrong you should ask for an appeal within 60 days.

position that the denial notices were constitutionally adequate is repugnant to this Court's prior rulings.

3. The ruling below violated this Court's prior ruling in *Commissioner, INS. v. Jean*, 496 U.S. 154, 110 S.Ct. 2316, 110 L.Ed.2d 134, 142 (1990).

Contrary to this Court's ruling in *Jean*, id., the ruling below failed to consider the pre-litigation action of the agency which precipitated the lawsuit.

In the face of the Secretary's admission that Neal was too disabled to understand how to appeal any of his three prior claims, there should not have been a finding that the agency's position had a "reasonable basis in law and fact".

CONCLUSION

The decision below conflicts with other circuits' decisions that have ruled on the denial notices in question. Plaintiffs who need to appeal such SSA denials must now be advised to move to another circuit to be able to exercise their constitutional rights to due process. The judgment below is repugnant to this Court's prior rulings as aforementioned. For the foregoing reasons, certiorari must be granted.

Dated this 14th day of April, 1995.

Respectfully submitted,

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v.

Donna E. SHALALA, Secretary of the United States Department of Health and Human Services, Defendant-Appellee.

Nos. 93-1399, 94-1125.

United States Court of Appeals,
Tenth Circuit.

Jan. 17, 1995.

Claimants brought action challenging, on federal due process grounds, sufficiency of notices of denial of benefits given by Social Security Administration (SSA). The United States District Court for the District of Colorado, 828 F.Supp. 815, Lewis T. Babcock, J., granted government's motion for summary judgment and denied one claimant's motion for attorney fees. Claimants appealed. The Court of Appeals, Paul J. Kelly, Jr., Circuit Judge, held that: (1) claimants had not shown causal connection between their injury and allegedly deficient denial notices, and, thus, lacked Article III standing to bring action alleging that notices were misleading in violation of their Fifth Amendment due process rights, and (2) government was substantially justified in its position with regard to claimant, and, thus, claimant was not entitled to attorney fees and costs under Equal Access to Justice Act (EAJA).

Affirmed.

Frederick W. Newall, Colorado Springs, CO, for plaintiffs-appellants.

Lowell V. Sturgill, Atty., Civ. Div. (Frank W. Hunger, Asst. Atty. Gen., William Kanter, Atty., Civ. Div., Dept. of Justice, Washington, DC and Henry L. Solano, U.S. Atty., Denver, CO, with him on the brief), for defendant-appellee.

Before MOORE, KELLY and BARRETT, Circuit Judges.

PAUL KELLY, Jr., Circuit Judge.

Plaintiffs-appellants Florence J. Gilbert, Roger L. Blair, Alvin L. Neal, Eunice M. Robinson, and Loretta L. London appeal from the district court's order granting the government's motion for summary judgment and dismissing the action for lack of standing. Plaintiff-appellant Alvin L. Neal appeals from the district court's order denying his motion for attorney's fees under the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412. Our jurisdiction arises under 28 U.S.C. § 1291 and we affirm.

Background

Plaintiffs each filed claims for social security benefits, were denied those benefits, and now allege that the denial notices they received were misleading and violated their Fifth Amendment right to due process. Specifically, Plaintiffs allege that the notices did not clearly inform them of the res judicata effects of the denial when reapplying for benefits without appealing their initial denials.

The district court held that Plaintiffs lacked standing to maintain the action because they had failed to show a causal connection between the language of the denial notices and their failure to appeal. *See Gilbert v. Shalala*, 828 F.Supp. 815, 818-19 (D.Colo.1993). Since the district court found that Plaintiffs failed to establish standing, it did not address Plaintiffs' motions for class certification and summary judgment.

The district court also held that Plaintiff Neal's claim was moot because his application for benefits had been reopened and he had thus obtained all relief sought from the district court. Thereafter Plaintiff Neal requested attorney's fees and costs pursuant to the EAJA. The district court, however, denied his request on the grounds that the position of the United States regarding Plaintiff Neal's claim was substantially justified.

I. Standing

"Standing is a question of law for the court to determine," *Motive Parts Warehouse v. Facet Enters.*, 774 F.2d 380, 389 (10th Cir.1985), thus we review the district court's determination of standing *de novo*. *Hackford v. Babbitt*, 14 F.3d 1457, 1465 (10th Cir.1994). Under Article III of the Constitution, jurisdiction of federal courts is limited to cases and controversies. U.S. Const. art. III, § 2. Standing is an essential part of the case-or-controversy requirement and involves three elements. *Lujan v. Defenders of Wildlife*, ___ U.S. ___, ___, 112 S.Ct. 2130, 2136, 119 L.Ed.2d 351 (1992). First, the plaintiff must have suffered an invasion of a legally-protected interest that is "concrete and particularized," and "actual or imminent,"

not "conjectural or hypothetical." *Id.* (internal quotations omitted) (citations omitted). Second, there must be a causal connection between the injury and the complained of conduct; that is, the injury must be " 'fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court.' " *Lujan*, ___ U.S. at ___, 112 S.Ct. at 2136 (quoting *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 41-42, 96 S.Ct. 1917, 1926, 48 L.Ed.2d 450 (1976)). Finally, it must be likely, not merely speculative, that the injury will be " 'redressed by a favorable decision.' " *Lujan*, ___ U.S. at ___, 112 S.Ct. at 2136 (quoting *Simon*, 426 U.S. at 38, 96 S.Ct. at 1924).

Plaintiffs bear the burden of proving standing with the manner and degree of evidence required at the particular stage of the litigation. *See Lujan*, ___ U.S. at ___, 112 S.Ct. at 2136. In response to a summary judgment motion, the nonmovant must present specific facts by affidavit or other evidence, which will be taken as true for purposes of the motion. *Id.* at ___, 112 S.Ct. at 2137. Summary judgment is then proper if there is no genuine issue of material fact so that the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c).

Plaintiffs have failed to present evidence that they meet the Article III requirement of standing. Specifically, Plaintiffs have not shown a causal connection between their injury and the allegedly deficient denial notices. To the contrary, the record in this case clearly establishes a lack of reliance by the Plaintiffs upon the notices. In deposition testimony or affidavits, Plaintiffs stated either that they relied on sources other than the challenged language in believing that they could reapply and receive

retroactive benefits, or could not remember reading the challenged language. Aplt.App. at 229, 150, 157-58, 276, 291, 395, 532-33.

Plaintiffs' argument that mere receipt of an allegedly defective denial notice is sufficient to establish standing is without merit. We believe that in order to satisfy the causal connection requirement set forth by *Lujan*, Plaintiffs must show that they relied on the challenged language in the denial notices. *See Burks-Marshall v. Shalala*, 7 F.3d 1346, 1349 (8th Cir.1993); *Day v. Shalala*, 23 F.3d 1052, 1066 (6th Cir.1994).

Although this issue is one of first impression in this circuit, we agree with the holdings of other circuits that a plaintiff must demonstrate reliance on the allegedly defective denial notices. The Eighth Circuit has held that a plaintiff lacked standing where she failed to demonstrate that the "alleged deficiency in the notice had any connection in fact with her own failure to seek review of the two early denials." *Burks-Marshall*, 7 F.3d at 1349. Similarly, the Sixth Circuit has held that the only claimants who could have been injured by deficient denial notices are those "who detrimentally relied on the inadequate denial notice." *Day*, 23 F.3d at 1066. Without such reliance, the injury is not fairly traceable to the challenged action. Since Plaintiffs have not made a showing of reliance on the denial notices, they have failed to meet the constitutional minimum required by *Lujan* and have no standing to maintain this action.

II. Attorney's Fees

Plaintiff Neal argues that the district court erred in denying his motion for attorney's fees and costs under the EAJA. The EAJA requires that a court "award to a prevailing party . . . fees and other expenses . . . incurred by that party in any civil action . . . , brought by or against the United States . . . unless the court finds that the position of the United States was substantially justified . . . " 28 U.S.C. § 2412(d)(1)(A). The government bears the burden of showing that its position was substantially justified. *Estate of Smith v. O'Halloran*, 930 F.2d 1496, 1501 (10th Cir.1991). We review the district court's determination of whether the government's position was substantially justified for abuse of discretion. *Gutierrez v. Sullivan*, 953 F.2d 579, 585 (10th Cir.1992), *cert. denied sub nom. Shalala v. Gutierrez*, ___ U.S. ___, 113 S.Ct. 3064, 125 L.Ed.2d 746 (1993).

The district court did not determine whether Plaintiff Neal was a prevailing party, but found that the position of the United States was substantially justified. *See* Aplt.App. at 1146. The test for substantial justification in this circuit is one of reasonableness in law and fact. *Gutierrez*, 953 F.2d at 584-85 (quoting *Fulton v. Heckler*, 784 F.2d 348, 349 (10th Cir.1986)). We agree that the government was reasonable in its defense that Plaintiff Neal lacked standing to bring his claim. We have already determined in this opinion that he failed to meet the *Lujan* requirements of standing. We also find that the government was reasonable in its position that the denial notices were constitutionally adequate. Nothing in the record indicates that the government believed that Plaintiff Neal had a valid due process claim.

Plaintiff Neal's contention that his claims were reopened as part of the government's litigation strategy fails. The record shows that the reopening was based on his mental impairment and lack of counsel at the time of his applications, not on grounds challenged in his suit. *See* Aplt.App. at 1118, 1121. Moreover, Plaintiff Neal has failed to refer to any evidence in the record supporting his assertion that the government admitted its prelitigation conduct was not substantially justified. *See* Appellant's Brief at 8. We will not search the record in order to find such evidence. *SIL-FLO, Inc. v. SFHC, Inc.*, 917 F.2d 1507, 1513 (10th Cir.1990).

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 92-B-1464

FLORENCE J. GILBERT, ROGER L. BLAIR, ALVIN L. NEAL, EUNICE ROBINSON, and LORETTA L. LONDON,

Plaintiffs,

v.

DONNA E. SHALALA, Secretary of the U.S. Department of Health and Human Services,

Defendant.

JUDGMENT

(Filed July 26, 1993)

Pursuant to and in accordance with the Memorandum Opinion and Order signed July 26, 1993 by the Honorable Lewis T. Babcock, United States District Judge, and incorporated herein by reference as if fully set forth, it is

ORDERED that judgment is hereby entered in favor of the defendant, Donna E. Shalala, and against the plaintiffs, Florence J. Gilbert, Roger L. Blair, Alvin L. Neal, Eunice Robinson and Loretta L. London, on defendant's motion for summary judgment. It is

FURTHER ORDERED that this action and complaint are hereby dismissed with prejudice, each party to bear its own costs.

DATED at Denver, Colorado this 26th day of July, 1993.

FOR THE COURT:

JAMES R. MANSPEAKER, CLERK

By: /s/ Stephen P. Ehrlich
Stephen P. Ehrlich,
Chief Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Lewis T. Babcock, Judge

Civil Action No. 92-B-1464

FLORENCE J. GILBERT, ROGER L. BLAIR, ALVIN L. NEAL, EUNICE M. ROBINSON, and LORETTA L. LONDON,

Plaintiffs,

v.

DONNA E. SHALALA, Secretary of the U.S. Department of Health and Human Services,

Defendant.

ORDER

(Filed Dec. 16, 1993)

Plaintiff Alvin L. Neal (Neal) moves for his attorney fees and expenses incurred in this lawsuit under the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412(d)(1) and based on the administrative reopening of his application for benefits. The motion is adequately briefed and oral argument will not materially aid its resolution. Because the position of the United States was substantially justified, Neal's motion for attorney fees and expenses will be denied.

I.

Neal brought the action in this court with four other named plaintiffs in order to make a due process challenge to the wording of certain denial notices received from the

Social Security Administration (SSA). Neal contended that the notices he received were misleading in that they contained inadequately worded warnings of the consequences of missing the deadline for filing an appeal to the next administrative level. Neal also sought the certification of a class of SSA claimants who had received similar notices over the past fifteen years.

Discovery revealed that Neal and the other Plaintiffs did not actually rely on the challenged wording in the denial notices in forgoing administrative appeals. Furthermore, in April, 1993, while this case was pending, the SSA notified Neal that his prior applications for benefits would be fully reopened. Thus, his claim here was rendered moot.

On cross motions for summary judgment, I dismissed this action with prejudice. After finding Neal's claim moot, I ruled against all the plaintiffs on the grounds of standing:

> I cannot presume plaintiffs' reliance on the notices merely because the concealed information was allegedly important, Rather, at this juncture plaintiffs must show that there is a genuine issue for trial regarding the causal connection between their alleged injury and the SSA's denial notices. Plaintiffs have not satisfied their burden as to this fundamental requirement. As a matter of law, they have no standing to maintain this action. Memorandum Opinion and Order at 10.

I.

The EAJA provides in relevant part that "a court shall award to a prevailing party other than the United States fees and other expenses . . . incurred by that party in any civil action . . . brought by or against the United States . . . , unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust." 28 U.S.C. § 2412(d)(1)(A). An award of fees and other expenses is mandatory unless the court finds that the government's position was substantially justified. *Estate of Smith v. O'Halloran*, 930 F.2d 1496, 1501 (10th Cir. 1991).

The government bears the burden of showing that its position was substantially justified. *Id.* "To do so, the government must prove that its case had a reasonable basis in law and in fact." *Id.* "Substantially justified" means "justified to a degree that could satisfy a reasonable person." *Pierce v. Underwood*, 487 U.S. 552, 565 (1988). "Substantially justified" means more than merely undeserving of sanctions for frivolousness. *Id.* at 566.

III.

In this case, the government advanced reasonable defenses against Neal's claim, the most fundamental of which was his lack of standing. In 1983, Neal's first application for benefits was denied by an initial denial notice. According to Neal's deposition, he did not remember reading the allegedly defective wording of the denial notice. Neal objected to the notice because it did not grant him benefits, not because of its wording. Neal's Deposition Transcript, at 14-16. Neal could not recall why

he decided not to ask for reconsideration. *Id.* at 16, 18. Neal received another initial denial notice in 1987. Again, he did not know why he failed to ask for reconsideration of that notice. *Id.* at 21. Because Neal did not identify the wording of the denial notice as his reason for failing to request reconsideration, he, like his fellow plaintiffs, lacked standing to bring this due process action. The only difference between Neal and the other plaintiffs was that his claim was also found to be moot.

Neal errs in contending that the government's position lacked substantial justification because the SSA agreed to reopen his prior application for benefits. This reopening was based on grounds other than those challenged here. The internal SSA memorandum and other documents proffered by Neal fail to indicate that the agency believed that Neal had a valid due process challenge to the denial notices or that he had standing to make such a challenge. Instead, this memorandum states that, under Social Security Ruling 91-5p, "good cause" could be established for Neal's failure to appeal his 1983 denial because of Neal's mental impairment and lack of legal representation.

This administrative reopening, based on grounds other than those challenged in this case, while arguably sufficient to allow Neal to assert prevailing party status, does not transform the government's case into an insubstantial one. Because the government has met its burden of proving that its position in this case was substantially justified, Neal's request for EAJA fees will be denied.

ACCORDINGLY, IT IS ORDERED that:

Neal's motion for attorney's fees and costs pursuant to the Equal Access to Justice Act is DENIED.

Dated: December 16, 1993 in Denver, Colorado.

BY THE COURT:

/s/ Lewis T. Babcock
LEWIS T. BABCOCK, JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Case No. 92-B-1464

CERTIFICATE OF MAILING

I certify that a copy of Order was mailed to the following on Dec. 16, 1993:

Frederick W. Newall, Esq.
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Department of Justice
Civil Division, Room 1052
901 E. Street, NW
Washington, DC 20530

/s/ Carol Henderson
Deputy Clerk

Florence J. GILBERT, Roger L. Blair, Alvin L. Neal, Eunice M. Robinson, and Loretta L. London, Plaintiffs,

v.

Donna E. SHALALA, Secretary of the U.S. Department of Health and Human Services, Defendant.

Civ. A. No. 92-B-1464.

United States District Court, D. Colorado.

July 26, 1993.

Claimants brought action challenging, on federal due process grounds, the sufficiency of notices of denial of benefits given by Social Security Administration (SSA). On defendant's summary judgment motion, the District Court, Babcock, J., held that claimants did not have standing to maintain action.

Motion granted.

Frederick W. Newall, Catherine Snow, Pikes Peak Legal Services, Colorado Springs, CO, Linda J. Olson, Legal Aid Soc., Denver, CO, for plaintiffs.

Chalk S. Mitchell, Asst. U.S. Atty., Denver, CO, Brian G. Kennedy, John Schumann, U.S. Dept. of Justice, Civil Div., Washington, DC, for defendant.

MEMORANDUM OPINION AND ORDER

BABCOCK District Judge.

At oral argument on defendant's summary judgment motion defense counsel aptly characterized this action as

"a lawsuit in search of a plaintiff". The material facts are undisputed. As a matter of law plaintiffs lack standing to maintain this action. I, therefore, grant defendant's motion for summary judgment. Consequently, I need not address plaintiffs' pending motions for class certification and summary judgment.

Throughout the 1980's plaintiffs applied for social security disability insurance benefits under Title II of the Social Security Act (42 U.S.C. §§ 401-433) and supplemental security income under Title XVI of the Social Security Act (42 U.S.C. §§ 1381-1383d). Plaintiffs claim the Social Security Administration's (SSA) denial notices were so deficient as to violate their procedural due process rights.

An applicant for social security benefits must pursue a series of administrative appeals if an application for benefits is denied. The process begins with the filing of an application for benefits. 20 C.F.R. §§ 404.603, 404.614, 416.305, and 416.325. If the SSA denies the application the applicant has sixty days after receipt of the denial notice to request reconsideration. 20 C.F.R. §§ 404.909 and 416.1409. If the SSA denies reconsideration the applicant may request a de novo hearing before an Administrative Law Judge (ALJ). 42 U.S.C. §§ 405(b)(1) and 1383(c)(1); 20 C.F.R. §§ 404.933 and 416.1433. This hearing must be requested within sixty days after the applicant receives the denial of the request for reconsideration. *Id.* If the ALJ denies the applicant benefits, the applicant then has sixty days after receipt of the ALJ's decision to request review by the Social Security Administration Appeals Council. 20 C.F.R. §§ 404.968 and 416.1468. An applicant may then file an action in federal district court within sixty days

after receiving a final decision of the Secretary of Health and Human Services. 42 U.S.C. § 405(g).

The SSA denied all plaintiffs' initial applications for benefits. Only plaintiffs Florence J. Gilbert (Gilbert) and Eunice M. Robinson (Robinson) requested reconsideration of the denials of their applications for benefits. After denial of her request for reconsideration, Gilbert failed to request a hearing before the ALJ. Robinson appealed throughout the administrative process and obtained a favorable decision.

Plaintiffs allege they did not pursue further administrative review because the denial notices led them to believe the decision was not final and could be reviewed later by filing a new application. They allege they understood the notices to say that with the filing of a new application they would be entitled to reopen their earlier applications and obtain benefits from the date of their original application.

The notices denying the applicants. Title II benefits stated, in pertinent part. "If you do not request reconsideration [or if you do not request a hearing] of your case within the prescribed time period, you still have the right to file another application at any time" or "If you do not request reconsideration [or if you do not request a hearing] within the sixty day time limit, you still have the right to file another application at any time. A new application is not the same as an appeal of this determination".

The notices denying Title XVI benefits stated in relevant part:

> If your condition gets worse, you may file a new application for Social Security income payments.
>
> If at anytime in the future you think you qualify for payment, please contact us immediately about filing a new application. We cannot make payment for any month before the month in which you apply.

or

> If at anytime in the future you think you qualify for payment please contact us right away about filing a new application. This is important to you because we cannot pay for any day before the day in which you file an application or the day you meet all the requirements, whichever is later.

A leaflet enclosed with each denial notice explained in detail the appeal process. However, it mentioned nothing about a decision becoming final or the effect of a decision becoming final if an applicant fails to request reconsideration or appeal timely.

An applicant who fails to request reconsideration or appeal within sixty days generally is prohibited from reopening an application. To obtain benefits the applicant must file a new application. The new application, however, will not entitle the applicant to benefits retroactively from the date of the first application. A new application also does not reopen a former application from which no appeal was taken. Thus, benefits do not begin to accrue until a new application is filed.

Plaintiffs contend the notices failed to inform them that the denials would be final unless appealed within

sixty days. They maintain the notices are ambiguous whether the filing of a new application allows them to reopen their initial application and acquire benefits retroactively from the date of their first application. Plaintiffs claim, therefore, that the misleading nature of the denial notices violated their due process rights.

Judicial power is limited to cases and controversies arising under the Constitution. *U.S. Const.* art. III § 2, cl. 1. Standing to sue is an essential and unchanging part of the case-or-controversy requirement of Article III. *Lujan v. Defenders of Wildlife*, 504 U.S. ___, ___, 112 S.Ct. 2130, 2136, 119 L.Ed.2d 351, 364 (1992).

> [T]he irreducible constitutional minimum of standing contains three elements: First, the plaintiff must have suffered an "injury in fact" – an invasion of a legally-protected interest which is (a) concrete and particularized . . . and (b) "actual or imminent, not 'conjectural' or 'hypothetical' ". . . . Second, there must be a causal connection between the injury and the conduct complained of – the injury has to be "fairly . . . traceable to the challenged action of the defendant, and not . . . the result of the independent action of some third party not before the court." . . . Third it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision." . . .

Lujan, 504 U.S. at ___, 112 S.Ct. at 2136, 119 L.Ed.2d at 364 (citations, footnote, and brackets omitted). Plaintiffs bear the burden of proving standing just like any other issue on which they bear the burden of proof.

> The party invoking federal jurisdiction bears the burden of establishing these elements. . . . Since

> they are not mere pleading requirements but rather an indispensable part of the plaintiff's case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stages of the litigation. . . . At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we "presume that the general allegations embrace those specific facts that are necessary to support the claim," . . . In response to a summary judgment motion, however, the plaintiff can no longer rest on such "mere allegations," but must "set forth" by affidavit or other evidence "specific facts," . . . which for purposes of the summary judgment motion will be taken to be true. And at the final stage, those facts (if controverted) must be "supported adequately by the evidence adduced at trial," . . .

Lujan, 504 U.S. at ___, 112 S.Ct. at 2136, 119 L.Ed.2d at 364-365 (citations and brackets omitted).

Summary judgment shall enter where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). Summary judgment is appropriate where the nonmoving party fails to make a showing sufficient to establish an essential element of its claim and on which it bears the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986). A party seeking summary judgment bears the initial responsibility of informing the district court of the basis for its motion, and identifying those

portions of the pleadings, depositions, answers to interrogatories, and admissions on file together with affidavits, if any, which it believes demonstrate the absence of genuine issues for trial. *Celotex*, 477 U.S. at 323, 106 S.Ct. at 2552; *Mares v. ConAgra Poultry Co., Inc.*, 971 F.2d 492, 494 (10th Cir.1992).

Once the moving party demonstrates an absence of evidence supporting an essential element of the plaintiff's claim, the burden shifts to the plaintiff to show a genuine issue for trial. *Celotex*, 477 U.S. at 324, 106 S.Ct. at 2553. Summary judgment is aimed at piercing the allegations of a complaint to assess the proof to ascertain whether there is a genuine need for a trial. *Burk v. K Mart Corp.*, 956 F.2d 213, 215 (10th Cir.1991). Therefore, a claimant cannot rely on the allegations of its complaint in responding to a summary judgment motion. *Burk*, 956 F.2d at 215. Rather, in responding to a summary judgment motion the nonmovant must point to specific facts in an affidavit, deposition, answers to interrogatories, admissions, or other similar admissible evidence demonstrating the need for a trial. *Celotex*, 477 U.S. at 324, 106 S.Ct. at 2553; *Mares*, 971 F.2d at 494. "Affidavits and evidence offered by the nonmovant must create a genuine issue for trial; viewing the evidence in a light most favorable to the nonmovant, it is not enough that the evidence be merely colorable or anything short of significantly probative." *Handy v. Price*, 996 F.2d 1064, 1064 (10th Cir.1993).

The operative inquiry is whether, based on all the documents submitted, and viewing the tendered evidence in the nonmovant's favor and drawing all reasonable inferences from this evidence in the nonmovant's favor, a reasonable factfinder could find by a preponderance of

the evidence that the plaintiff is entitled to a verdict. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202 (1986); *Mares*, 971 F.2d at 494.

The SSA denied Gilbert's request for reconsideration of the denial of her application for widow disability benefits. She failed to take the next step and request a hearing before the ALJ. Her denial notice explained that to qualify for widow disability benefits her disability must arise within seven years after the death of her spouse. Gilbert thought this provision allowed her to reapply for benefits anytime within the seven year period and receive benefits retroactively from the date of her first application. (Gilbert depo. p. 23 ll. 8-18.) Laboring under this belief Gilbert did not request a hearing before the ALJ after the SSA denied her request for reconsideration. (Gilbert depo. p. 23 ll. 16-18). Nothing in this notice caused Gilbert to believe that she would be giving up her benefits if she failed to request a hearing. (Gilbert depo. p. 23 ll. 19-24.) Gilbert understood, however, that if she did not apply for reconsideration she would lose her rights. (Gilbert depo. p. 13 ll. 19-21.) She did not consider the notice denying her request for reconsideration to be misleading. (Gilbert depo. 14 ll. 17-22.)

The language concerning the seven year time limit for applying for widow disability benefits upon which Gilbert allegedly relied, is not the focus of Gilbert's due process violation claim. The effect of this language is not at issue here. Rather, Gilbert merely alleges that the denial notice's language quoted at page 3, *supra*, was misleading and caused her to believe that SSA's decision denying her benefits was not final. There is no showing that Gilbert's failure to appeal is fairly traceable to this

language. She produces no evidence tending to show that the questioned language in the denial notice caused her to refrain from requesting a hearing before an ALJ. Thus, there is no showing of a causal connection between the SSA's notice and Gilbert's alleged injury. Consequently. Gilbert lacks standing to challenge the notice.

Plaintiff Roger L. Blair (Blair) applied for benefits once in Colorado and once in Arkansas. He appealed the Arkansas denial of benefits. The denial of his Arkansas application is not at issue here. He did not request reconsideration of his Colorado denial of benefits. Blair's Colorado denial notice said that he could not receive benefits because he was capable of working. Also, someone at the SSA told him that he could not apply for social security benefits while he was pursuing worker's compensation benefits. (Blair depo. p. 17 ll. 3-13.) Other than disputing the SSA's determination that he could work and that he could not receive social security benefits while pursuing worker's compensation benefits – which is not the subject of the dispute here – Blair said that the denial notice was not misleading. (Blair depo. p. 16 ln. 20 – p. 17 ln. 25; p. 24 ll. 11-13.) Blair later stated, however, that "the only thing misleading to me about it is, you can't apply again, and then you can. That's the only misleading part of it, I guess." (Blair depo. p. 35.)

This statement is not significantly probative that the notice caused Blair to forego further administrative review. It intimates nothing concerning whether Blair thought he could obtain benefits retroactively from the date of his first application by refiling a new application later. This ambiguous testimony is mere colorable support for Blair's claim. Furthermore, Blair admits that the

denial was not misleading. This statement, taken in conjunction with his other unambiguous testimony, is insufficient to persuade a reasonable trier of fact that Blair was induced by the notice to refrain from pursuing further administrative review. Blair's evidence fails to create a genuine issue for trial concerning the causal connection between his failure to appeal and the language of the denial notice. Accordingly, he has failed to demonstrate that he has standing to maintain this action.

Plaintiff Alvin L. Neal (Neal) applied for benefits in 1983 and 1987. He requested reconsideration of neither denial. Since the filing of this action, however, the SSA has reopened Neal's application. Because the SSA has reopened Neal's application he has received all the relief he can obtain here. Accordingly, he has suffered no injury in fact. Furthermore, his claim is moot.

Likewise, Robinson has suffered no injury in fact and her claim is also moot. Regardless of the allegedly defective notices, she timely requested reconsideration and a hearing. She eventually received a favorable determination. Because Robinson sustained no injury as a result of the allegedly defective notices there is no live controversy before me in relation to her claim.

Plaintiff Loretta L. London (London) applied for benefits in 1983, 1984, 1989, and 1991. Her 1991 claim is pending before an ALJ. The SSA denied her 1983, 1984, and 1989 applications. She never moved for reconsideration. Because of her amnesia London cannot say whether she was misled or confused by the denial notices. (London affidavit ¶ 3.)

London presents no evidence tending to show that the notices caused her not to seek reconsideration. Absent some evidence of causal connection between the SSA's notices and her failure to seek administrative review any determination of causation rests upon pure speculation.

Citing *Affiliated Ute Citizens v. United States*, 406 U.S. 128, 92 S.Ct. 1456, 31 L.Ed.2d 741 (1972) plaintiffs argue alternatively their reliance on the allegedly defective notices need not be proven because reliance can be inferred if the unrevealed information was material. *Affiliated Ute* was an action under section 10(b) of the 1934 Securities Exchange Act against bank insiders for fraud. The insiders, who owed the plaintiffs a fiduciary duty, failed to disclose material facts about the value of plaintiff's stock before inducing them [sic] sell their stock. The Court stated:

> Under the circumstances of this case, involving primarily a failure to disclose, positive proof of reliance is not a prerequisite to recovery. All that is necessary is that the facts withheld be material in the sense that a reasonable investor might have considered them important in the making of this decision. . . . This obligation to disclose and this withholding of a material fact establish the requisite element of causation in fact. . . .

Affiliated Ute, 406 U.S. at 153-154, 92 S.Ct. at 1472 (citations omitted).

This rule is peculiar to the federal securities laws and has no place in the standing context here. I cannot presume plaintiffs' reliance on the notices merely because the concealed information was allegedly important. Rather, at this juncture plaintiffs must show that there is a

genuine issue for trial regarding the causal connection between their alleged injury and the SSA's denial notices. Plaintiffs have not satisfied their burden as to this fundamental requirement. As a matter of law they have no standing to maintain this action.

Accordingly, IT IS ORDERED that defendant's motion for summary judgment is granted and plaintiffs' claims are dismissed with prejudice. Each party shall bear its own costs.

Supreme Court, U.S.
FILED
JUN 16 1995
CLERK

No. 94-1689

In the Supreme Court of the United States

OCTOBER TERM, 1994

FLORENCE J. GILBERT, ET AL., PETITIONERS

v.

SHIRLEY S. CHATER,
COMMISSIONER OF SOCIAL SECURITY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether petitioners had standing to challenge notices from the Social Security Administration denying their claims for disability benefits on the ground that the notices did not adequately explain their appeal rights, when petitioners failed to show that they relied on the notices in deciding not to appeal.

2. Whether petitioner Neal was entitled to attorney's fees under the Equal Access to Justice Act.

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No. 94-1689

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v.

SHIRLEY S. CHATER,
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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-7) is reported at 45 F.3d 1391. The opinion of the district court dismissing the case (Pet. App. 16-27) is

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[1] Section 105(a)(1) of the Social Security Independence and Program Improvements Act of 1994, Pub. L. No. 103-296, 108 Stat. 1472, transferred the functions of the Secretary of Health and Human Services "with respect to or in support of the programs and activities the administration of which is vested in the Social Security Administration" to the Commissioner of Social Security, effective March 31, 1995. Under Section 106(d) of the Act, 108 Stat. 1477, Shirley S. Chater, Commissioner of Social Security, should be substituted for Donna E. Shalala, Secretary of Health and Human Services, as the defendant-respondent in this action.

reported at 828 F. Supp. 815. The order of the district court denying petitioner Neal's request for attorney's fees (Pet. App. 10-14) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 17, 1995. The petition for a writ of certiorari was filed on April 17, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. Petitioners applied for disability insurance benefits under Title II of the Social Security Act and for Supplemental Security Income benefits under Title XVI of the Act. See 42 U.S.C. 401-433 (1988 & Supp. V 1993) (Title II), 1381-1383d (1988 & Supp. V 1993) (Title XVI); see also 20 C.F.R. Pts. 404 (Title II regulations), 416 (Title XVI regulations). The Social Security Administration (SSA) made initial determinations that petitioners were not eligible for benefits and notified them of that determination in writing. See 20 C.F.R. 404.902, 416.1402.[2] The notice advised each petitioner that he or she could ask for reconsideration of the initial determination. See Pet. App. 18-19 (reproducing relevant language in denial notices); see also 20 C.F.R. 404.904, 416.1404. Petitioners Blair, Neal, and London failed to ask for reconsideration, causing the initial determinations to become binding. See 20 C.F.R. 404.905, 416.1405; see generally Pet. App. 2, 18.

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[2] Disability determinations are initially made by the State in which the claimant resides under regulations and policies promulgated by SSA. See 20 C.F.R. 404.1503, 416.1010-416.1018. For the sake of simplicity, we will refer to SSA as the decisionmaker at each stage.

The other two petitioners, Gilbert and Robinson, sought reconsideration, which was denied. Pet. App. 18. The written notice of the denial of reconsideration advised them that they could request a *de novo* hearing before an administrative law judge (ALJ). *Id.* at 18-19; see also 20 C.F.R. 404.922, 416.1422.[3] Petitioner Gilbert did not request a hearing; petitioner Robinson initially requested one, but later withdrew her request because she found work. Pet. App. 18; C.A. App. 330-331.[4] Their failure to seek further administrative review caused the reconsideration decisions to become binding. 20 C.F.R. 404.921, 416.1421.

After an adverse determination on an application for disability benefits becomes binding, the claimant may file a new application. But if the new application is granted, benefits are generally awarded based solely on the date upon which the new application was filed. Specifically, Title II disability benefits may be awarded for up to 12 months prior to the month in which the new application was filed, 42 U.S.C. 423(b); 20 C.F.R.

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[3] If the claimant makes a timely request, the ALJ will hold a hearing and issue a ruling based on the evidence presented at the hearing or otherwise contained in the record. See 20 C.F.R. 404.953, 416.1453. A claimant who is dissatisfied with the ALJ's decision may appeal to the Appeals Council of SSA within 60 days of receiving notice of the ALJ's decision. See 20 C.F.R. 404.968, 416.1468. A claimant dissatisfied with the Appeals Council's action may seek judicial review in federal district court within 60 days. See 42 U.S.C. 405(g).

[4] The district court incorrectly stated that petitioner Robinson "appealed throughout the administrative process and obtained a favorable decision." Pet. App. 18. As stated in the text, SSA denied Robinson's request for reconsideration. C.A. App. 325, 328.

404.621(a), and SSI benefits may be awarded beginning with the month in which the new application was filed, 20 C.F.R. 416.335. Only in certain specified circumstances may a decision denying a prior claim be "reopened" and benefits awarded for prior periods.[5] In the absence of such circumstances, the denial of the prior claim has preclusive effect (for the time period covered by that claim) by virtue of the doctrine of administrative res judicata.[6]

b. Years after their claims were denied, petitioners filed new applications for disability benefits under Titles II and XVI. In the new applications, they sought to have their prior claims reopened and benefits awarded based on the prior applications. In addition to

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[5] A claim for benefits may be reopened (1) within 12 months of the initial determination, for any reason; (2) within four years (for Title II benefits) or two years (for SSI benefits) of the initial determination, for "good cause"; or (3) at any time, in certain extraordinary cases (for example, cases involving fraud). See 20 C.F.R. 404.987-404.989, 416.1487-416.1489.

[6] In 1990, Congress amended the Social Security Act to preclude the application of administrative res judicata to adverse determinations by SSA made on or after July 1, 1991, if the claimant failed to file a timely appeal "in good faith reliance upon incorrect, incomplete, or misleading information, relating to the consequences of reapplying for benefits in lieu of seeking review of an adverse determination, provided by any officer or employee of the [SSA]." Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, §§ 5107(a)(1), 5107(b), 104 Stat. 1388-269, codified at 42 U.S.C. 405(b)(3) (Supp. V 1993). The amendment does not apply to the adverse determinations that petitioners sought to have reopened in this action, because they were made before July 1991. See C.A. App. 636. In any event, petitioners do not advance any claim under the 1990 amendment.

filing the new applications, petitioners filed this action in the United States District Court for the District of Colorado. Petitioners contended that their prior claims should be reopened because the denial notices that they received from SSA violated due process. In particular, they argued that the notices concerning their prior applications did not adequately explain that they could not obtain benefits based on those applications if they made new applications.

c. During the course of the litigation, SSA decided to review petitioner Neal's prior applications for disability benefits pursuant to Social Security Ruling (SSR) 91-5p, 56 Fed. Reg. 29,971 (1991). SSR 91-5p codifies a long-standing agency policy providing that SSA may review an adverse determination on a prior application, even after the time for appealing the adverse determination has expired, if the claimant was unrepresented at the time of the prior determination and lacked the mental capacity to pursue an appeal. *Id.* at 29,972. Applying that policy here, SSA awarded petitioner Neal the benefits he sought in this litigation. See Pet. App. 3, 7, 25.[7]

2. The district court granted summary judgment in favor of the government. Pet. App. 16-27. It held that petitioner Neal's claim was moot because SSA had

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[7] SSR 91-5p provides for an extension of the time within which an adverse determination may be reviewed. As a technical matter, that sort of relief differs from the reopening of a prior claim. Either form of relief, however, may lead to an award of retroactive benefits. Because the courts below described the administrative relief accorded to petitioner Neal as a "reopening" (Pet. App. 7, 25)—and because the difference between an extension of the deadline for seeking review and the reopening of a prior claim is not significant for purposes of this case—we will use the same term hereafter.

reopened his prior claim and awarded him all the benefits that he sought in this action. *Id.* at 25. The district court further held that the other petitioners lacked standing to challenge SSA's denial notices. The court observed that none of the petitioners had shown that they had failed to appeal the denial of their prior claims as a result of the allegedly defective denial notices. It accordingly concluded that petitioners had not shown that the alleged defect caused them any harm. *Id.* at 22-27.

In a later order, the district court denied petitioner Neal's request for attorney's fees under the Equal Access to Justice Act (EAJA), 28 U.S.C. 2412. Pet. App. 10-14. The court observed that, under the EAJA, "[a]n award of fees and other expenses [to a prevailing party] is mandatory unless the court finds that the government's position was substantially justified." *Id.* at 12. The court determined that, "[i]n this case, the government advanced reasonable defenses against Neal's claim, the most fundamental of which was his lack of standing." *Ibid.* The court rejected Neal's argument that SSA's eventual decision to reopen his prior claims established that SSA's position was not substantially justified. It explained that "[t]his reopening [was] based on grounds other than those challenged [here]," namely, "Neal's mental impairment and lack of legal representation" at the time of his prior application. *Id.* at 13. The court therefore concluded that, although the reopening was "arguably sufficient to allow Neal to assert prevailing party status," it did not "transform the government's case into an insubstantial one." *Ibid.*

3. The court of appeals affirmed. Pet. App. 1-7. It held, first, that petitioners "failed to present evidence

that they meet the Article III requirement of standing." *Id.* at 4. It explained (*ibid.*):

> [Petitioners] have not shown a causal connection between their injury and the allegedly deficient denial notices. To the contrary, the record in this case clearly establishes a lack of reliance by [petitioners] upon the notices. In deposition testimony or affidavits, [petitioners] stated either that they relied on sources other than the challenged language in believing that they could reapply and receive retroactive benefits, or could not remember reading the challenged language.

The court also held that petitioner Neal was not entitled to an EAJA award because the government's position was substantially justified. *Id.* at 6-7. In the court's view, "the government was reasonable in its defense that [petitioner] Neal lacked standing * * * [and] in its position that the denial notices were constitutionally adequate." *Id.* at 6.

ARGUMENT

1. The court of appeals correctly held that petitioners lack standing to contest the adequacy of the notice denying their prior claims for disability benefits. That holding, contrary to petitioners' contention (Pet. 10-14), does not conflict with any decision of another court of appeals. Further review is therefore not warranted.

The Constitution limits the power of the federal courts to deciding "Cases" and "Controversies." U.S. Const. Art. III, § 2. Standing "is an essential and unchanging part of the case-or-controversy requirement." *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560 (1992). To have standing, a plaintiff must show

that he or she has (1) suffered "injury in fact" (2) that is "fairly . . . trace[able] to the challenged action of the defendant" and (3) that is "likely" to be "redressed by a favorable decision." *Id.* at 560-561; accord *Allen* v. *Wright*, 468 U.S. 737, 751 (1984).

As both lower courts held, petitioners failed to show that they suffered injury traceable to the allegedly defective notice. Pet. App. 4-5, 23-26. Petitioners alleged that they suffered a loss of benefits because they filed new applications rather than appealing the denial of their prior applications. Petitioners did not show, however, that their decisions not to pursue administrative appeals of the determinations denying their prior applications were based on the denial notices. If petitioners did not rely on the denial notices, then any defect in the notices caused them no harm. Because petitioners failed to show that the alleged defect in the notices led to their loss of benefits, the court of appeals correctly held that they lacked Article III standing.[8]

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[8] Petitioners do not challenge the finding of both courts below that they did not show actual reliance on the allegedly defective language in the denial notices. In any event, that concurrent finding by both courts below would not warrant further review. See, *e.g.*, *Goodman* v. *Lukens Steel Co.*, 482 U.S. 656, 665 (1987). Although petitioners do not directly challenge the finding of no reliance, they do include (Pet. 6) in their statement of facts the portion of petitioner Gilbert's deposition testimony that they cited in the courts below as evidence that she detrimentally relied on the notice. The district court correctly determined that Gilbert's testimony did not concern the language in the notices that petitioners have challenged in this action; instead, her testimony concerned a portion of the notice describing the eligibility requirements for widow disability benefits. See Pet. App. 23.

That holding accords with decisions in two other circuits that, like the present case, involved due process challenges to SSA's denial notice. In *Burks-Marshall* v. *Shalala*, 7 F.3d 1346 (1993), the Eighth Circuit held that the plaintiff lacked standing because "[s]he ha[d] not shown that the alleged deficiency in the notice had any connection in fact with her own failure to seek review of the two early denials." *Id.* at 1349. In *Torres* v. *Shalala*, 48 F.3d 887 (1995), the Fifth Circuit similarly held that the plaintiff "lack[ed] standing to raise the due process claim" because he "ha[d] not shown any causal connection between the allegedly misleading language in the first two notices and his subsequent failure to seek judicial review." *Id.* at 893.

Contrary to petitioners' contention, the decision below does not conflict with *Gonzalez* v. *Sullivan*, 914 F.2d 1197 (9th Cir. 1990). *Gonzalez* did not address the plaintiff's standing to challenge SSA's denial notice, and the court's consideration of that challenge on the merits cannot be deemed to have decided the standing issue by implication. See, *e.g.*, *Pennhurst State School & Hospital* v. *Halderman*, 465 U.S. 89, 119 (1984); *Hagans* v. *Lavine*, 415 U.S. 528, 535 n.5 (1974).[9]

Nor does the decision below conflict with *Day* v. *Shalala*, 23 F.3d 1052 (6th Cir. 1994). In *Day*, the Sixth Circuit held that the denial notice sent to Title II claimants at the reconsideration stage before February 1990 violated due process because it did not adequately explain the preclusive effect of a failure to appeal. *Id.* at 1064-1066. The Sixth Circuit further

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[9] Petitioners likewise err in relying (Pet. 12) on *Christopher* v. *Secretary of HHS*, 702 F. Supp. 41 (N.D.N.Y. 1989), which did not address the standing issue.

held, however, that only a "limited number of [the] class members" defined by the district court were entitled to relief because of that violation. *Id.* at 1066. It observed that "[t]he class certified by the District Court was not well defined" because it "fail[ed] to take into account the distinctions between the varying grounds for relief claimed by plaintiffs." *Id.* at 1057. The Sixth Circuit accordingly provided its own description of the class entitled to relief (*id.* at 1066):

> [T]he only claimants who could have been injured * * * are those who detrimentally relied on the inadequate denial notice. A claimant relied to his or her detriment on the inadequate notice if he or she was denied benefits at the reconsideration level then received the inadequate notice, and thereafter filed a new application rather than continuing the appeal process, and then were presented by the Secretary with a claim of *res judicata* or received less in retroactive benefits than he or she would have had they successfully appealed initially.

Petitioners' reliance (Pet. 10-11) on this passage to support their claim of a circuit conflict is misplaced. For one thing, the passage could be read to require claimants to show that they filed a new application "rather than continuing the appeal process" *because of* the defective notice. *Day*, 23 F.3d at 1066; see also *id.* at 1060 (excusing failure to exhaust administrative remedies) ("[T]he only class members who are entitled to reopen their claims for benefits are those who detrimentally relied on the inadequate Title II reconsideration denial notices used before February, 1990. By definition, these class members filed a new application when they should have continued the appeal process."). So read, the passage in *Day* is consistent

with the decision below. In any event, the passage does not refer to the plaintiffs' standing, which the government did not challenge. Instead, the passage was intended to delineate that portion of the class certified by the district court that was entitled to relief as a result of the court of appeals' ruling on the merits. The decision in *Day* therefore is not binding on the Sixth Circuit with respect to the standing issue presented here.

Petitioners cite (Pet. 11-12), and we are aware of, only one published decision that supports their claim of standing. In *Cuffee* v. *Sullivan*, 842 F. Supp. 1219 (W.D. Mo. 1993), the district court held that the plaintiff's mere receipt of a denial notice conferred Article III standing for a due process challenge to the notice. *Id.* at 1225. That holding, however, is no longer good law in light of the Eighth Circuit's later decision in *Burks-Marshall.*[10]

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[10] In an unpublished opinion not cited in the petition, the First Circuit cited the decision below in holding that "reliance on the defective [denial] notice [from SSA] is a core ingredient" of a due process challenge to the notice. *Gilbert* v. *Sullivan*, No. 93-2309, 1995 WL 91120, at *2 (Mar. 6, 1995). The First Circuit then cited *Day* for the proposition that "essentially objective criteria" may be used "to assess whether or not a claimant ha[s] established injury because of reliance" on a defective notice. *Id.* at *3. The First Circuit determined that the "historical facts of record support[ed] a finding of detrimental reliance" in that case. *Ibid.* The court cited the fact that the claimant filed her prior application pro se; that she testified that she did not know how to appeal the denial of that application; and that she filed a new application "for the same benefits." *Ibid.* It is not clear from the decision below whether the Tenth Circuit would consider such evidence sufficient to support an inference of detrimental reliance. In any event, any tension between the decision below and the

2. Petitioners also contend (Pet. 12-17) that the denial notices that they received violated due process. The courts below properly declined to address that contention, having correctly determined that none of the petitioners met the Article III requirements for raising it. Review of that contention by this Court therefore is not warranted.[11]

3. Petitioner Neal contends (Pet. 17) that the denial of his application for an EAJA award conflicts with *Commissioner, INS* v. *Jean*, 496 U.S. 154 (1990). That contention is based on the erroneous assertion (Pet. 17) that the court of appeals "failed to consider the pre-litigation action of [SSA]." On appeal, petitioner Neal cited only one pre-litigation action by SSA that he claimed showed that the government's position was not substantially justified, namely, SSA's refusal to reopen his prior claims. Pet. C.A. Br. 29-30. Neal argued that SSA's later decision to reopen his claims showed that its prior refusal to do so was not substantially justified. *Id.* at 28. The court of appeals expressly considered that argument, as well as the

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First Circuit's unpublished decision in *Gilbert* does not warrant further review.

[11] As petitioners acknowledge (Pet. 16), the versions of the denial notices that they received are no longer used. Moreover, SSA has recently announced that it will provide administrative relief to those individuals who can show that they relied on certain versions of the denial notices used prior to March 1990 in deciding to forgo appeals. SSR 95-1p, 60 Fed. Reg. 20,549 (1995). SSA's discontinuance of the use of denial notices like those challenged in this action, and SSA's provision of an administrative remedy for claimants who can show detrimental reliance on those notices, weigh against further review of petitioners' contention that the notices violated due process.

evidence in the record concerning the reopening of Neal's claims. Pet. App. 6-7 (citing C.A. App. 1118, 1121).[12] The court correctly held that that evidence did not impugn SSA's position for EAJA purposes because the evidence indicated that the reopening was unrelated to petitioners' due process challenge. *Ibid.*[13]

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[12] The evidence consisted of an internal SSA memorandum concerning the reopening of Neal's claims. See C.A. App. 1121. The memorandum stated (*ibid.*) that Neal's prior claims could be reopened under Social Security Ruling 91-5p, 56 Fed. Reg. 29,971 (1991), if at the time of his prior applications he was unrepresented and lacked the mental capacity to pursue an administrative appeal.

[13] The petition suggests (Pet. 6-9, 15-16) that petitioners Blair, Robinson, and London suffered from mental disorders that prevented them from understanding their rights when their prior applications were denied. Although the record contains some evidence that petitioner Robinson was mentally impaired at the time of the denial of her prior applications (see Pet. 8-9), any such impairments could not have affected her ability to pursue administrative review, because she was represented by legal counsel at all pertinent times. Petitioners Blair and London have not presented to SSA any claim that they suffered mental impairments at the time of the denial of their prior applications that prevented them from pursuing administrative review. As noted above (note 12, *supra*), SSA could consider such claims under SSR 91-5p. Because petitioners Blair and London have not exhausted their administrative remedies on that issue, it may not be raised here. See *Weinberger* v. *Salfi*, 422 U.S. 749, 765 (1975); *Parisi* v. *Davidson*, 405 U.S. 34 (1972); *McKart* v. *United States*, 395 U.S. 185 (1969).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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